Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERM, 1980

No. 79-1780

ALAN FELS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD M. MOSER,
BURTON A. ROSE,
Counsel for Petitioner,

PERUTO, RYAN & VITULLO,
Washington West Building,
N.E. Corner 8th and Locust Streets,
Philadelphia, Pennsylvania 19106
(215) 925-5800

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No.

ALAN FELS,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner above-named respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on March 5, 1980.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, dated March 5, 1980, is not yet reported. A copy of that Opinion is attached hereto as Appendix A.

The Opinion of the United States District Court for the Eastern District of Pennsylvania, which was affirmed without discussion by the action of the Court of Appeals for the Third Circuit above noted, is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*) was entered on March 5, 1980. A Petition for Rehearing in Banc was timely filed and denied on April 7, 1980. (Appendix C, *infra*). On April 18, 1980, upon consideration of Petitioner's Application to Stay the Issuance of the Mandate, the United States Court of Appeals for the Third Circuit entered an Order staying said mandate until May 7, 1980 (Appendix D, *infra*). This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether this Court should extend the constitutional rule announced in *Payton v. New York*, #78-5420 (April 15, 1980), to a situation where Federal Agents, acting without an arrest warrant, entered a third party's home to arrest a suspect?

2. Whether the lower Court, as affirmed without discussion by the Court of Appeals, erred in holding that the Government had properly established both probable cause and exigent circumstances as would justify a warrantless arrest of a suspect inside the Petitioner's home, (the result of which was the seizure of evidence and the obtaining of statements incriminatory as to the Petitioner)?

3. Whether a search warrant, clearly Federal in character, was unlawful where issued by a non-Court of record under Rule 41 of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath, or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner Alan Fels, was charged in the United States District Court for the Eastern District of Pennsylvania (Criminal No. 79-?2) with Conspiring with one Robert James to distribute Cocaine, a Schedule II narcotic controlled substance, on January 7, 1979, in violation of 21 United States Code §846.

Prior to trial, a Motion to Suppress Statement and Physical Evidence which had been seized or obtained on or about January 7, 1979 inside Alan Fels' residence was litigated and denied. The Honorable William Ditter, United States District Judge, ruled on this Motion in a Bench Opinion on April 10, 1979, a copy of which is annexed hereto as Exhibit "B". Thereafter, the Petitioner entered a plea of guilty and was sentenced by the District Court to a term of three years imprisonment on June 1, 1979.

Pursuant to a procedure approved in the Third Circuit, *United States v. Moskow*, 588 F.2d 882 (3rd Cir. 1978), the parties had agreed that the issues raised in the Motion to Suppress could be directly appealed for adjudication by the Third Circuit Court of Appeals, the guilty plea notwithstanding.

On March 5, 1980, the Court of Appeals for the Third Circuit (No. 79-1889) issued an Opinion affirming without discussion the action of the lower Court in denying the Motion to Suppress. A subsequent and timely Petition for Rehearing in Banc was also denied. The Court of Appeals for the Third Circuit has stayed the issuance of its mandate in this matter pending review of the instant Petition for Writ of Certiorari.

At the hearing below on the Motion to Suppress, the testimony developed that an undercover Drug Enforce-

ment Administration Agent had arranged for the purchase of Cocaine from one Robert James for $30,000.00, which was to occur at the Holiday Inn in New Hope, Pennsylvania, on January 7, 1979. The conversations leading up to and including this purchase were electronically monitored and recorded by the Drug Enforcement Administration.

At 2:00 P.M. on January 7, 1979, James arrived at the Holiday Inn in company with his wife, Jacqueline James. After being shown by the undercover D.E.A. Agent that the $30,000.00 cash was available, James and his wife left to obtain the cocaine to complete the transaction. Five surveillance vehicles under the control of the D.E.A. kept watch on all of these activities. James and his wife were observed entering the residence, subsequently established as that of Alan Fels, at 2:15 P.M.

At 2:45 P.M., James returned to the hotel without his wife. Inside the hotel, he told the undercover D.E.A. Agents that he could only get one-half (½) pound of Cocaine at that time for $15,000.00. James was arrested and allegedly told the Agents that, "If I'm not back there within a half hour, my people are going to know something went wrong." He also allegedly told these Agents that there were additional drugs and weapons at the Fels' residence. While the Agents attempted to decide whether or not to immediately return to the Fels' residence, surveillance continued at that home. A decision was made to return to the Fels' residence for the purpose of arresting Jacqueline James.

Thereafter, a forcible entry was had into the Fels' residence, as the D.E.A. Agent in charge testified that the Petitioner, Alan Fels, fled into the inner recesses of the house after the Agent had announced his identity. Once inside the house, the Agents obtained a statement from

the Petitioner which was incriminatory as well as the controlled substances in question which were used to support the Indictment below.

After the house was secured, a search warrant was subsequently obtained from a District Justice of the Peace and the items in question were actually seized by the police.

Fels was subsequently charged by both State and Federal Authorities for the offenses which arose from these events. Both the evidence found in his residence and the statements allegedly made to these Agents would have been used by the Government at the conspiracy charge trial had the same followed the denial of the Suppression Motion.

REASONS FOR GRANTING THE WRIT

I. The Court should extend the Constitutional rule announced in *Payton vs. New York* to situations where the authorities, without an arrest warrant, enter a third party's home to arrest a suspect.

In *Payton v. New York*, No. 78-5420 (April 15, 1980), this Court announced a Constitutional rule which prohibits, pursuant to the Fourth Amendment, the authorities from making a warrantless entry into a suspect's home in order to make a routine felony arrest.

In that Opinion, the Court specifically noted that it was not considering the question of the authority of the police, without an arrest warrant, to enter a third party's home to arrest the suspect. In *Payton*, the police broke into Payton's apartment intending to arrest Payton.

In the instant case, the D.E.A. Agents in question returned to the Alan Fels' residence for the purpose of arresting not Alan Fels but Jacqueline James. However, because of what occurred inside the residence, it was Alan Fels who subsequently stood trial on this Indictment. Accordingly, it was Alan Fels who filed a Motion to Suppress the results of this warrantless arrest and its subsequent search and seizure and the obtaining of these statements, pursuant to *Wong Sun v. United States*, 371 U.S. 471 (1963).

The Opinion of the lower Court (Appendix B) was affirmed without discussion by the Opinion of the United States Court of Appeals for the Third Circuit (Exhibit "A"). In its Opinion, the District Court did not consider whether or not the Rule announced in the *Payton* case should be extended to situations such as the one before

it in view of the fact that *Payton* had not been decided as of that time (April 9, 1979).

Accordingly, the Petitioner respectfully prays that this Honorable Court either grant this Writ of Certiorari in order to determine whether or not the rule announced in *Payton* should be extended to circumstances such as the instant matter, or, in the alternative, remand this matter to either the Court of Appeals for the Third Circuit or the United States District Court for the Eastern District of Pennsylvania so that either of those Courts may re-examine this record in order to determine if the applicability of the *Payton* doctrine would effect the result rendered by those Courts.

It should be noted that the United States Court of Appeals for the Third Circuit in the case of *United States v. James Williams*, No. 79-1153 (December 28, 1979), an unreported Opinion as of the present time, held that "a warrantless entry of a suspect's home to arrest him" is illegal in the absence of exigent circumstances and that this protection "extends as well to one such as Appellant who is in the dwelling of a third party at the time of the arrest", citing *Fisher v. Volz*, 496 F.2d 333 (3rd Cir. 1974). Therefore, there is precedent in the Third Circuit which, had it been applied in the instant matter, should have resulted in the formulation of the rule of law which is now being sought by this Petitioner as a result of the filing of this Petition for a Writ of Certiorari, to wit, that it is a violation of the Fourth Amendment to effect a warrantless arrest of a suspect in the house of a third party absent exigent circumstances. The failure of the Third Circuit to apply that rule of law in this case prompts this Petition.

II. The lower Court (as affirmed without the discussion by the Court of Appeals) erred by holding that the Government had properly established both probable cause and exigent circumstances to justify the warrantless arrest of a suspect inside the residence of the petitioner.

Assuming that the rule announced in the *Payton* case is applicable instantly, the burden was upon the Government in this case to establish that the warrantless arrest of Jacqueline James inside the residence of Alan Fels, which precipitated all of the subsequent events which led to this Indictment, was justified by reason of the existence of both probable cause and exigent circumstances.

In discussing these issues, the District Court, in a Bench Opinion affirmed without discussion by the Court of Appeals, misapplied the standard of exigent circumstances and further concluded that probable cause existed without support in the record for such a conclusion.

The testimony below showed that the Agents were able to obtain a state search warrant within approximately 45 minutes (66a). This shows that there was ample time to obtain a warrant for the arrest of Jacqueline James, noting that approximately an hour elapsed from the time of Robert James' arrest at the hotel (3.00 P.M.), until the Agents' arrival at the Fels' residence (4:00 P.M.).

This consideration is critical in judging the presence or absence of exigent circumstances. The lower Court found the presense of such circumstances (513a) by reasoning that the Agents were in possession of information that the Fels' residence contained additional drugs, guns, and persons and that there was no time to get such

a warrant so that the drugs in question might have been destroyed. This holding is in clear contradiction of the District Judge's additional finding that the Fels' residence had been under continuous surveillance so that the suspect, Jacqueline James, who had not been seen to emerge (516a), could not have escaped.

The action of the District Court in focusing on the possible destruction of the drugs as an exigent circumstance was improper in view of the fact that the expressed purpose of the Agents' return to the Fels' residence was to arrest Jacqueline James rather than to commence a search and seizure of drugs. Therefore, in applying the exigency analysis of *United States v. Dorman*, 435 F.2d 385 (D.C. Cir. en banc 1970), the District Court incorrectly applied those standards to a return to the residence for the purpose of the seizure of drugs rather than for the purpose of the arrest of Jacqueline James.

A proper analysis of the exigent circumstances test pursuant to *Dorman* would have shown that, although the offense in question was a serious one, there was no indication of violence. Furthermore, there was no evidence whatsoever which would have indicated that Mrs. James was armed. As is argued infra, there was no "clear showing of probable cause" as to Mrs. James. It is conceded that there was a strong reason to believe that she remained inside the house, in light of the extensive surveillance above referred to. There was no likelihood that she would have escaped if not swiftly apprehended in view of that surveillance. Finally, the circumstances of the entry were not peaceable in that a forcible entry was effected.

There is no evidence in this case that the officers who were determined to arrest Jacqueline James faced any

danger either by delaying that arrest until a warrant was obtained or by continuing to guard the scene of the house. *United States v. Rubin*, 474 F.2d 262 (3rd Cir. 1973).

In *United States v. Robertson*, 606 F.2d 853, 859 (9th Cir. 1979), a definition of exigent circumstances was supplied by the Ninth Circuit in the following manner:

> "Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained. The need for an immediate search must be apparent to the police, and so strong *as to outweigh* the important protection of individual rights provided by the warrant. There must be *no practical way* to avoid these risks and yet follow the Constitution's mandate of detached judicial supervision of such intrusions." (Emphasis added.)

In the instant case, the District Court did not adopt such a balancing test to determine if the protection of individual rights in this case outweighed the need for an immediate arrest of Jacqueline James. In fact, there was in this case "a practical way" to avoid these risks and yet follow the requirement of a warrant by continuing the previously noted surveillance pending the obtaining of a warrant. Under these circumstances, the Government is charged with the responsibility for having not obtained an arrest warrant within the time which was clearly available. *United States v. Rubin, supra.*

The standard of exigent circumstances found in *United States v. Campbell*, was not satisfied here either. That standard was defined in the following manner by the Second Circuit (581 F.2d at 25):

"The phrase "exigent circumstances" refers generally to those situations in which law enforcement agents will be unable or unlikely to effectuate any arrest, search or seizure, for which probable cause exists, unless they are swiftly and without prior judicial authorization."

The record in this case clearly indicates that, in light of the surveillance and available time, an arrest of Jacqueline James could have been obtained without the necessity of the entry into the Fels' residence without a warrant under the circumstances which occurred instantly.

Accordingly, at the very least, this Court should direct that this matter be remanded to either the United States Court of Appeals for the Third Circuit or the District Court for the Eastern District of Pennsylvania so that this case may be reexamined in light of the responsibility of the Government to establish exigent circumstances under a clear and unequivocal standard. In the Alternative, this Court should grant this Petition for a Writ of Certiorari and establish a standard of exigent circumstances which will supply the lower Courts with a certain definition as to what circumstances will justify a departure from the rule announced in *Payton v. New York, supra.*

An analysis of this record will show that the District Court focused its concern on the point of the possible destruction of the Cocaine in this case; however, the D.E.A. Agents themselves were apparently not so concerned with such a fear in view of their repeated concessions below that their purpose in returning without a warrant to the Fels' residence was not to obtain the drugs which might be found there but rather to arrest Jacqueline James; the Agent in charge so testified at page 83 of the Record:

"Q. Did you ever have any discussions with your fellow Agents about getting a search warrant?

A. When?

Q. After James was arrested.

A. Yes, after we were in Fels' house.

Q. I'm not talking about at that point, I'm talking about after James was arrested and still at the Motel, did you have any discussions relative to getting a search warrant of the home?

A. No, we were going to arrest Jacqueline James.

Q. So was that your main purpose on going back, to arrest Jacqueline James?

A. That was by main purpose, yes.

Q. And wasn't it also your purpose to search that home?

A. Not at that time, no."

This reference to the Record below is offered to suggest to this Court that the action of the District Court, as affirmed without discussion by the Court of Appeals, was in constitutional error by determining the question of exigent circumstances as if the Government Agents were intent on searching and seizing controlled substances rather than, as the record shows, to arrest Ms. James.

Furthermore, with respect to the requisite element of probable cause, the Record is clear that the judgment of the District Court, as affirmed without discussion by the Court of Appeals, that probable cause exists was not supported by the Record. The Record will establish that Mrs. James was linked to this offense by nothing more than her mere presence at the initial conversations

in the hotel concerning the Cocaine transaction. The Record of those conversations, which was eiectronically monitored, indicates no language on her part which would support a conclusion that she was knowledgeable or otherwise involved with respect to that transaction. Therefore, the conclusion of the District Court that probable cause existed to support an arrest of Jacqueline James was in error and would further constitute a violation of the Fourth Amendment of the United States Constitution. See *Beck v. Ohio,* 379 U.S. 89 (1964).

Therefore, this is a case where the authorities returned to the residence of the Petitioner with neither a warrant, probable cause, nor exigent circumstances in order to justify their intrusion into the residence for the purpose intended. Accordingly, this Court should grant the Petition for Writ of Certiorari and reverse the judgments below.

III. The search warrant in this case was clearly Federal in character so that the District Court should have suppressed the fruits thereof for failure to comply with Rule 41 of the Federal Rules of Criminal Procedure.

The Record in this case is clear that the search warrant in question was issued by a Pennsylvania District Justice of the Peace. Such an issuing authority under Pennsylvania law is not a "Court of Record" within the meaning of that requirement under Rule 41 of the Federal Rules of Criminal Procedure. See *United States v. Sellers,* 483 F.2d 37 (5th Cir. 1973), *cert. den.* 417 U.S. 208 (1974); *United States v. Martin,* 600 F.2d 1175 (5th Cir. 1979); *United States v. Bedford,* 519 F.2d 650 (3rd Cir. 1975); *Navarro v. United States,* 400 F.2d 315 (5th Cir.

1968); *United States v. Brougher,* 19 FRD 79 (Pa. 1956). Under these authorities, a warrant which is sufficiently Federal in character fails to comply with Rule 41 when it is issued by such a Judge. This requirement of Rule 41 is based upon a fundamental policy judgment that warrants which are to be eventually used in Federal prosecutions must be reviewed for their propriety by a Court of sufficient legal qualification. As stated in *United States v. Sellers, supra,* this standard reflects "an intent that Federal searches were not to be conducted on the authority of search warrants issued by state tribunals whose functions were so lowly that they have not made Courts of Record." *United States v. Sellers, supra,* 483 F.2d at 43; *United States v. Pechac,* 54 FRD 187 (Arizona, 1972); *United States v. Burke,* 517 F.2d 377 (2d Cir. 1975).

In the instant case, the testimony established that, following the entry of these Agents into the Fels' residence for the purpose of arresting Jacqueline James, they obtained certain incriminatory statements from the Petitioner and, in addition thereto, obtained knowledge of the presence and whereabouts of certain controlled substances and related paraphernalia. The testimony further established that none of these contraband items were touched or otherwise seized by the Agents until a search warrant was obtained and executed.

It is also important to note that the Record clearly establishes that no attempt whatsoever was made by the authorities to obtain a warrant from a "Court of Record" within the meaning of Rule 41.

At the time of the Argument of this case before the United States Court of Appeals for the Third Circuit, counsel for Appellee, the United States, conceded to the panel of the Court of Appeals that this Warrant was in

fact Federal in character because of the extensive Federal involvement in the obtaining and executing of that Warrant. For example, this Record shows that it was the Drug Enforcement Administration Agents who initiated this investigation and they supplied the informant, the money, the hotel room, the electronic monitoring equipment, the surveillance vehicles, and the manpower to both obtain and execute the warrant. Although the District Court concluded that the warrant was not sufficiently Federal in character,[1] particularly because it was the local police that expressed a desire to obtain a search warrant, the Record is clear that the Federal Agents participated in the warrant's being obtained and executed "upon the possibility that something would be disclosed of official interest" to the Federal sovereign. *United States v. Martin*, 600 F.2d at 1180.[2]

Furthermore in *United States v. Martin*, the 5th Circuit Court of Appeals noted that the United States Supreme Court "has not directly addressed this Federal/State cooperation issue" since its 1961 decision of *Mapp v. Ohio*, 367 U.S. 643.[3]

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1. It must be noted that the District Court, in its Bench Opinion (524a), concluded that it is only "when the Federal officers obtain a warrant that the special rules of Rule 41 apply . . .", thereby misapplying the precepts of *United States v. Sellers, supra*, and other cited cases.

2. Not only did the Federal Agents initiate and continue this investigation through the time of the entrance into the Fels' residence, they in fact supplied the information contained in the Affidavit in support of the search warrant; in fact, the Agent in charge from the DEA typed that Affidavit for the Affiant, a local police chief. Thereafter, those Agents helped the State people conduct that search at the Fels' residence.

3. This Court may desire to entertain this Petition and grant a Writ of Certiorari in order to clarify the standards to be employed by the lower Courts in determining whether or not a State search warrant is sufficiently Federal in character as to trigger the requirements of Rule 41; see *United States v. Bedford*, 519 F.2d at 654 footnote 9.

Therefore, this Petitioner respectfully prays that this Court grant this Petition and cause the judgment of the District Court, as affirmed without discussion by the Court of Appeals, to be reversed so that any and all evidence and/or statements obtained by virtue of the execution of this Warrant shall be suppressed in view of this violation of Rule 41.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, which affirmed without discussion a Bench Opinion of the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

/s/ Donald M. Moser
DONALD M. MOSER

/s/ Burton A. Rose
BURTON A. ROSE
Counsel for Petitioner